BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN D. FRIEND Claimant VS. **BOEING COMPANY** Respondent AND **INDEMNITY INS. CO. OF NORTH AMERICA** Insurance Carrier	)	Docket No. 1,018,461

ORDER

Respondent and its insurance carrier (respondent) request review of the March 31, 2005 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) concluded claimant timely and properly notified respondent of his upper extremity and low back complaints and that his ongoing complaints were attributable to his work activities. And as such, the ALJ determined that claimant's injury arose out of and in the course of his employment with respondent.

The respondent requests review of this determination. It contends the claimant failed to establish that he sustained a compensable work injury to his left upper extremity or his back, and that claimant failed to provide contemporaneous notice of those alleged injuries. Respondent maintains that claimant has had several work-related accidents in the past including one to the back and in each instance, he reported them to plant medical, treatment was provided and he was released to return to work. Distilled to its essence, respondent argues that once claimant is returned to work, he must provide a separate notice of any further injury or aggravation, and that any earlier notifications of back

problems are too remote in time to place respondent on notice of a potential claim as required by K.S.A. 44-520. Simply put, there is no "universal notice" for an injury and claimant cannot rely upon an isolated comment from 2002 between himself and his lead man for a series of repetitive injuries culminating in 2004.

Claimant argues the preliminary hearing Order should be affirmed in all respects.

The issues to be resolved by the Board are as follows:

1. Whether claimant's present complaints of back pain and bilateral extremity complaints arose out of and in the course of his employment with respondent; and

2. Whether claimant provided timely notice of accident under K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board finds that the ALJ's preliminary hearing Order should be affirmed.

The ALJ provided a rather detailed summary of the facts relating to this claim in her Order and the Board adopts that statement as its own. To the extent necessary, however, the Board will supplement the facts to substantiate its decision to affirm the ALJ's preliminary hearing Order.

Claimant alleges a series of repetitive injuries to his left upper extremity and his back which he attributes to his work activities in 2001 and continuing until April 8, 2004, his last day worked. The ALJ concluded claimant's job activities as a CNC milling operator were repetitive in nature and the Board agrees with that conclusion. Thus, for purposes of establishing his entitlement to benefits under the Workers Compensation Act, claimant's date of accident is April 8, 2004, the last date he performed his regular job duties.[1]

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[2] The phrase "in the course of" employment relates to the time, place, and

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[1] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[2] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

The ALJ concluded claimant's job as a CNC milling operator was repetitive in nature and required claimant to routinely use both his upper extremities as well as bend, stoop and lift parts. Claimant testified that he regularly experienced symptoms in his left upper extremity as well as his back while performing his regular duties. Dr. Antonio Osio, the only physician to speak to this issue concluded that work caused claimant's present complaints. Both the ALJ and the Board note that claimant's description of his work duties and the resulting pain he experienced is uncontroverted by respondent. Accordingly, based upon the evidence offered at the preliminary hearing, the Board affirms the ALJ's conclusion that claimant's left upper extremity and back complaints are causally related to his repetitive work duties for respondent.

Respondent also contests the sufficiency of claimant's notice of his injuries. In regard to the left upper extremity, respondent concedes that claimant reported his injury to the plant medical office and was provided with treatment over two years ago. Claimant was seen by Dr. Melhorn and apparently released to return to work. Unfortunately, Dr. Melhorn's records are not contained within the record and the evidence fails to indicate precisely what claimant's diagnosis was or what Dr. Melhorn's treatment recommendations were, if any. It is, however, uncontroverted that claimant was provided with a wrist brace which he wore every day while working.

As to the back complaints, claimant testified that he notified both his lead man and his manager about his ongoing problems. In one instance back in 2002, claimant and Jeff Crawford, his lead man, were working and Mr. Crawford asked him if his back hurt. Apparently claimant had applied BenGay, which gave off a distinctive odor which Mr. Crawford recognized. Mr. Crawford also testified that he remembered claimant complaining about how lifting parts caused him increased pain.[4] While Mr. Crawford isn't a supervisor, he is the lead man on the 3rd shift and accidents can be reported to him. Moreover, claimant testified he mentioned his back and upper extremity problems to others in supervisory positions, including Manzel Durrett and Kenneth Barkley, both supervisors. Specifically, on April 8, 2004, claimant contacted Mr. Barkley and advised him that he was having back problems and required an MRI. There was no mention of a work-related injury during this conversation.

The ALJ concluded claimant satisfied the notice requirements of K.S.A. 44-520. K.S.A. 44-520 states:

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[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995)

[4] P.H. Trans. at 65-66.

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The ALJ indicated that claimant's repeated complaints of increased back pain in connection with his work duties and his daily use of a wrist brace constituted sufficient "information which would reasonably make the [r]esponent aware of the injury and of potential for workers compensation claim."[5]

By the barest of margins, the Board agrees with the ALJ's conclusions. Claimant was well aware of the need to report injuries. He had utilized the procedures in the past but admittedly did not do so in this instance, likely because of the repetitive nature of his injuries. His daily work activities simply took their toll and, on April 8, 2004, he was unable to continue. Claimant continually wore a brace which would, to all who could see, certainly suggest that a physical problem existed, particularly when respondent had already provided treatment for such a complaint at some point in the past. As for the back, claimant spoke with the lead man who, on the 3rd shift, is as much of a supervisor as can be found during that time of night. While claimant would have been better served to go to the plant medical office at 6:00 a.m. that morning, his decision not to do so is not fatal to his claim. Notice can occur during an ongoing series of accident and it does not need to keep being given.

Based upon all the facts and circumstances, the Board finds no reason to disturb the ALJ's conclusion with respect to timely notice regarding claimant's left upper extremity and back complaints. Accordingly, the ALJ's preliminary hearing Order is affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.[6]

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[5] ALJ Order (Mar. 31, 2005) at 3.

[6] K.S.A. 44-534a(a)(2).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 31, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2005.

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BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director